In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-773

VERLON HILBURN, ET AL., PETITIONERS

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1a–11a) is not reported. The opinion of the court of appeals (Pet. App. 12a–17a) is reported at 463 F. 2d 1207.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on August 30, 1972 (Pet. App. 31a). The petition for a writ of certiorari was filed on November 27, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners were denied due process by the Department of Agriculture's withholding of farm subsidy payments from them as a setoff against administratively determined overpayments in previous years.

STATEMENT

The Hilburns, who own farms and ranches in Texas, New Mexico, and Arizona (Pet. App. 1a), participated in several agricultural subsidy programs including the Feed Grain Program (7 U.S.C. 1441 note; 16 U.S.C. 590p(h) and (i)), the Agricultural Conservation Program (16 U.S.C. 590d *et seq.*), and the Cropland Adjustment Program (7 U.S.C. 1838) (App. 6a[1]). In April 1968 the Department of Agriculture commenced an extensive audit of the amounts paid to the Hilburns under these three programs during the years 1964 to 1968. The auditor interviewed the Hilburns and many of their business acquaintances during an investigation that covered four States. He also examined tax, real estate, and agricultural records pertaining to the Hilburns (App. 96a–99a, 214a–217a, 232a–233a).

Based upon this audit, the Department issued a stop-order on November 20, 1968, which halted all further payments to the Hilburns (App. 157a). Then, following meetings between the Hilburns, their attorney and Agriculture officials, the Deputy Administrator notified each of the Hilburns that he had determined on the basis of the audit that they had

[1] "App." refers to the appendix filed in the court of appeals.

received a total of $318,448.34 in improper payments and were liable for that amount plus interest (App. 26a–50a, Pet. App. 60a–62a).

With respect to the Feed Grain Program, the Deputy Administrator found numerous instances in which the various Hilburns had exceeded their feed grain base, that is, had planted more than the authorized maximum acreage for feed grains. He also found numerous instances in which the Hilburns had received payments under the Agricultural Conservation Program for expenses that they had not incurred but rather had been paid by other Hilburns. The Deputy Administrator concluded that these practices constituted attempts by the Hilburns to evade the maximum authorized payment to an individual under this program. The Deputy Administrator also found that one of the Hilburns had violated the Cropland Adjustment Program regulations by having exceeded the feed grain base on other farms in which he held an interest.

At the time the letters of notification were issued, the stop-orders with respect to two Hilburns were removed to permit the release of withheld payments in excess of the amounts determined to have been improperly paid (App. 158a). The notification letters also informed the Hilburns of their right to an administrative appeal, which would include an informal hearing. The Hilburns demanded a hearing under the Administrative Procedure Act, but the Department replied that that Act was inapplicable. In February 1970, Agriculture officials provided the Hilburns with the bulk of the audit report, including everything the

Deputy Administrator considered relevant to his decision (App. 91a, 92a).

The hearing, which was delayed until July 22, 1970, upon successive requests by the Hilburns' attorney (App. 159a), was attended by four of the Hilburns and their attorney. They were first given the pages of the audit report not previously furnished to them. Their attorney then protested that the designated hearing examiner had been personally involved in the investigation and previous determinations made in the case. The attorney also argued that due process required that the Hilburns be given the opportunity to confront and cross-examine witnesses against them, rather than have the Department base its case against them entirely on the audit report. When these protests were denied, the Hilburns refused to participate further in the hearing (App. 102a–131a).

In his October 20, 1970, appeal decision, the Deputy Administrator found that the Hilburns were liable for improper payments of $224,283.82 plus $24,050.66 interest, rather than $318,448.34 plus interest as initially determined (App. 213a, 231a–232a). The amount withheld by the stop-orders in excess of the liability established by the appeal decision was then released (App. 213a, 232a).

The Hilburns commenced this action on October 7, 1970, thirteen days prior to the Deputy Administrator's decision on appeal. They sought a writ of mandamus ordering the Secretary to pay all amounts withheld, an injunction preventing any future withholding, and a judgment declaring that the Agricul-

ture setoff procedures violated both the Administrative Procedure Act and the Due Process Clause (App. 25a). In its answer, the government asserted a counterclaim based upon the Deputy Administrator's final determination of the Hilburns' liability (App. 133a).

Upon the Hilburns' motion, their complaint was tried separately to the district court prior to the trial on the counterclaim. On June 22, 1971, the district court entered judgment in favor of the Hilburns of $272,851.96 (App. 244a–249a), holding that this amount had wrongfully been withheld by the Department because the Department's procedures had not been in accordance with its regulations and had violated due process. The court also held the APA applicable and ruled that the Agriculture regulations in issue failed to comply with the APA. On July 7, 1971, the court issued a writ of mandamus ordering the Secretary to pay the Hilburns $272,851.96 (App. 250a).

The court of appeals reversed (Pet. App. 12a), holding that "the Secretary had a right to withhold current funds in sums equal to the amounts administratively determined to have been overpaid in prior years, at least until such time as the issues relating to these overpayments have been judicially determined" (Pet. App. 13a). Distinguishing *Goldberg* v. *Kelly,* 397 U.S. 254, the court further held that a hearing prior to withholding was not constitutionally required.

On July 17, 1972, the court of appeals *sua sponte* directed the parties to file supplemental briefs discussing the applicability of *Fuentes* v. *Shevin,* 407

U.S. 67, which had been decided shortly after its decision (Pet. App. 29a–30a). Thereafter, on August 30, 1972, the court adhered to its original decision (Pet. 31a).

The district court tried the government's counterclaim on January 3 to 5, 1973. No decision has yet been announced.

ARGUMENT

1. Review of this case is not warranted, especially in light of the current posture of the proceedings. Petitioners have now had a trial in the district court on the merits of their claim. Thus the question of their entitlement to the funds at issue will shortly be decided after a trial fully comporting with due process. Therefore, the question whether the setoff here deprived petitioners of due process in view of the procedures of the Department of Agriculture is of no continuing vitality in this controversy.

2. In any event, the decision of the court of appeals is correct. It has long been settled that any creditor, including the government, has the right to withhold unilaterally sums payable to a debtor as a setoff against the indebtedness. *E.g., United States* v. *Munsey Trust Co.*, 332 U.S. 234; *Cherry Cotton Mills, Inc.* v. *United States*, 327 U.S. 536; *Gratiot* v. *United States*, 15 Pet. 336, 369. Cf. *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759. A creditor is justified in refusing "to pay what he owes until he is paid what is due him," *United States* v. *Munsey Trust Co., supra*, 332 U.S. at 240, in order to avoid the risk that a judgment against the debtor would prove uncollectable. The applicable Department of

Agriculture regulations expressly authorize withholding and setoff of payments under the three subsidy programs involved here. 7 C.F.R. 13.3, 13.4, 751.140, and 775.18 (1971); 7 C.F.R. 701.40 (1971). Since the Secretary found that the Hilburns were overpaid from 1964 to 1967, they are not entitled to a judgment for the amount withheld unless and until a court determines that they were not overpaid.

Relying on *Fuentes* v. *Shevin*, 407 U.S. 67, which dealt with State prejudgment replevin laws, petitioners claim, however, that a hearing must precede any setoff because of past overpayments. But *Fuentes* itself states that a hearing is not required before "summary seizure of property to collect the internal revenue of the United States," as this Court had held in *Phillips* v. *Commisioner*, 283 U.S. 589. Thus, even if the setoff here is characterized as a "seizure" of petitioners' property, the government's interest is equally strong in preventing depletion of the public treasury by making subsidy payments to which the recipient is not entitled because of prior overpayments.[2] And in

[2] *Goldberg* v. *Kelly*, 397 U.S. 254, 264, held that the interest in conserving fiscal resources did not render unnecessary a hearing before termination of welfare benefits because "the crucial factor * * * —a factor not present in the case of * * * virtually anyone else whose governmental entitlements are ended—is that termination of [welfare] aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." The position of petitioners in this case, of course, is in no way analogous to that of welfare beneficiaries who depend on continued receipt of governmental benefits. Thus, even if the setoff in this case is viewed as a partial and temporary termination of governmental benefits, petitioners' interest does

any event, unlike the situation in *Fuentes*, the government has not here seized property in petitioners' possession.

Moreover, the Hilburns were afforded an opportunity to be heard through the Department of Agriculture auditor's interviews prior to the setoff and through the proceedings before the Deputy Administrator after the audit and stop-orders had been issued. As *Fuentes* indicates, the form of the hearing required by due process depends on the importance of the payee's interest, 407 U.S. at 89, n. 20, and the auditor's pre-setoff interviews with the Hilburns are comparable to the interviews that preceded the termination of unemployment compensation in *Torres* v. *New York State Department of Labor*, 321 F. Supp. 432 (S.D.N.Y.), vacated, 402 U.S. 968, adhered to, 333 F. Supp. 341, affirmed 405 U.S. 949, where the beneficiary had a much stronger interest in light of the need for unemployment compensation.[3]

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not outweigh the government's interest in protecting the public revenue, and a pretermination hearing is thus not required by the Due Process Clause.

[3] Moreover, in *Fuentes* the Court recognized that the right to predetermination proceedings can be waived. 407 U.S. at 94. Contractual provisions for the resolution of disputes have long been respected in government contracts. *E.g.*, *United States* v. *Wunderlich*, 342 U.S. 98, and an agency's regulations constitute part of the contracts it enters. *Paul* v. *United States*, 371 U.S. 245; *G. L. Christian and Associates* v. *United States*, 312 F. 2d 418 (Ct. Cl.), certiorari denied, 375 U.S. 954. Thus, the Agriculture regulations providing for withholding and setoff without extensive predetermination proceedings were part of the Hilburns' contract for subsidy payments. For purposes of the Due Process Clause, the Hilburns' had no vested "property" interest in continued subsidy payments that was not limited by Agriculture's power of withholding and setoff.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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